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SUPREME COURT, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

WALTER NEWKIRK and JUNE FAY NEWKIRK,

Petitioners,

versus

JOSEPH G. BIGARD, individually and d/b/a B & B Oil Company, B & B OIL COMPANY, an Illinois corporation, PAUL A. LUCAS, MILDRED A. LUCAS, BRAD EVILSIZER, in his official capacity as Director of the Illinois Department of Mines and Minerals, ROCK ISLAND REFINING CORPORATION, an Indiana corporation, SAM BIGARD, WILLIAM E. BORAH, LAWRENCE EATON, JAMES G. TOMAW, VERNON E. HILDEBRAND, MARTHA L. HILDEBRAND, W. W. BARNHART, VERNAL ROAN, LAVEEDA ROAN, WILLIAM E. ROAN, EVELYN ROAN, GARY K. TUSSEY, STANLEY SCHROCK, OLNEY SAVINGS AND LOAN ASSOCIATION, an Illinois corporation, NON-RECORD CLAIMANTS and UNKNOWN OWNERS,

Respondents,

AND

JOSEPH G. BIGARD, individually and d/b/a B & B Oil Company, PAUL A. LUCAS, MILDRED A. LUCAS, SAM BIGARD, ESTHER BIGARD, WILLIAM E. BORAH, LAWRENCE E. EATON, JAMES G. TOMAW, VERNON R. HILDEBRAND, MARTHA L. HILDEBRAND, W. W. BARNHART, VERNAL ROAN, LAVEEDA ROAN, WILLIAM E. ROAN, EVELYN ROAN, GARY K. TUSSEY, STANLEY SCHROCK, and OLNEY SAVINGS AND LOAN ASSOCIATION,

Respondents,

versus

WALTER NEWKIRK and JUNE FAY NEWKIRK,

Petitioners.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

Where it appears from the face of the agency order that the agency transcended its jurisdictional boundaries in entering that order, are the Newkirks' rights to due process denied by the supreme court arbitrarily declaring that order voidable rather than void?

Did the supreme court, through its unexpected and retroactive ruling, deprive the Newkirks of due process by arbitrarily eliminating a right of the Newkirks to have had the agency order contain provisions mandated by the legislature allowing choice as to participation?

Did the supreme court, through its unexpected and retroactive ruling, deprive the Newkirks of due process by arbitrarily sanctioning the taking of property from Walter Newkirk without proper provision, as mandated by the legislature, having been made for his interests in the drilling unit?[1]

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[1] All of the parties are listed in the caption. Abbreviated references to the parties are as follows: Petitioners WALTER NEWKIRK and JUNE FAY NEWKIRK are referred to collectively as "the Newkirks" and WALTER NEWKIRK is referred to individually as "Walter Newkirk"; Respondent JOSEPH BIGARD, individually and d/b/a B & B Oil Company is referred to as "Bigard"; the Illinois Department of Mines and Minerals (referred to in the applicable statute as "the Mining Board"), of which Respondent BRAD EVILSIZER is the Director, is referred to as "IDMM"; and Respondents PAUL A. LUCAS and a MILDRED A. LUCAS are referred to as "the Lucases".

TABLE OF AUTHORITIES

Cases:

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May it please the Court:

OPINIONS BELOW

The opinion of the Illinois Supreme Court entered September 20, 1985, motion for rehearing denied December 2, 1985, and the opinion of the Illinois Appellate Court for the Fifth Appellate District entered March 6, 1984, motion for rehearing denied August 6, 1984, are set out in the Appendix. The decision of the Illinois Supreme Court is reported as *Newkirk v. Bigard* at 109 Ill. 2d 28, 485 N.E. 2d 321, 92 Ill. Dec. 510 (1985) and the decision of the Illinois Appellate Court is reported as *Newkirk v. Bigard* at 125 Ill. App. 3d 454, 466 N.E. 2d 243, 80 Ill. Dec. 791 (5th Dist. 1984). A copy of the agency order at issue is also set forth in the Appendix.

JURISDICTION

The judgment of the Illinois Supreme Court sought to be reviewed was entered on September 20, 1985. A timely Petition for Rehearing was denied without opinion by the supreme court on December 2, 1985. Certain relevant portions of this Petition most directly raising the federal questions and a letter noting the denial of this Petition are set forth in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const., Amend. XVI, § 1.

The state statute at issue *Ill. Rev. Stat.*, Ch. 96½, § 5436 provides, in pertinent part, as follows:

"(a) When 2 or more separately owned tracts of land are embraced within an established drilling unit, or when there are separately owned interests in all or a part of such units, the owners of all oil and gas interests therein may validly agree to integrate their interests and to develop their lands as a drilling unit. Where, however, such owners have not agreed to integrate their interests . . . the Mining Board [IDMM] shall, for the prevention of waste or to avoid the drilling of unnecessary wells, require such owners to do so and to develop their lands as a drilling unit, before issuing a permit for the drilling thereon. The Mining Board, as a part of the order establishing a drilling unit or units, may prescribe the terms and conditions upon which the royalty interests in the unit or units shall, in the absence of voluntary agreement, be determined to be integrated without the necessity of a subsequent separate order integrating the royalty interests. Each such integration order shall be upon terms and conditions that are just and reasonable."

"(b) All orders requiring such integration shall be made after notice and hearing and shall be upon terms and conditions that are just and reasonable and will afford to the owners of all oil and gas interests in each tract in the drilling unit the **opportunity** to recover or receive their just and reasonable share of oil and gas from the drilling unit without unreasonable expense . . ."

"(c) ***."

"(d) **Each such integration order shall . . . prescribe the time and manner in which all the owners** in the drilling unit **may elect to participate** therein; and make provision for the payment by all those who **elect to participate** therein of the reasonable actual cost therof, plus a reasonable charge for supervision and interest. **If requested, each** such integration **order shall** further **provide** for one or more just and equitable **alternatives whereby an owner who does not elect to participate in the risk and cost** of the drilling operation, or operation, of a well **may elect to surrender his leasehold interest** to the participating owners on some reasonable basis and for a reasonable consideration which, if not agreed upon, shall be determined by the Mining Board, **or may elect to participate** in the drilling and operation, or operation, of the well, **on a limited or carried basis** upon terms and conditions determined by the Mining Board to be just and reasonable. ***"

Ill Rev. Stat., Ch. 96½, § 5436 (emphasis added).

STATEMENT OF THE CASE

The declaration by the Illinois Supreme Court that an order entered by IDMM integrating the oil and gas interests of Walter Newkirk and the Lucases is voidable rather than void is questioned in this case. That order allowed an oil and gas well to be drilled on land owned by Walter Newkirk without his consent and not only failed to provide Walter Newkirk with any opportunity to choose whether he wanted to participate but actually required him to participate (Appendix at 52-53). The statute authorizing IDMM to enter in tegration orders expressly mandates that "each" integration order provide opportunities to owners to choose whether they want to participate or not (*Newkirk v. Bigard*, Appendix at 28-29).

Walter Newkirk bought the north 30 acres of a 40 acre tract in 1961 subject to a reservation of one-half of the mineral rights until May 4, 1981 or, if operations commenced prior to that date, for so long as production continued from those operations. Since, after several mineral explorations during this 20-year term, Walter Newkirk was not willing to allow further exploration near the end of this term, the Lucases and Bigard filed a Petition with IDMM seeking integration under *Ill Rev. Stat.*, Ch. 96½, § 5436. As part of that Petition, Bigard, the proposed developer, and the Lucases, the owners of the reserved mineral interests, requested, among other things, the following relief:

> "e. That the board **prescribe the time and manner** in which all the owners in the drilling unit **may elect to participate** therein including the following alternatives:
>
> 1. Make provision for payment by all who **elect to participate** therein, of the reasonable actual costs tereof plus a reasonable charge for supervision and interest.
>
> 2. Provide one or more equitable **alternatives if Walter Newkirk does not elect to participate** in the risk and cost of the drilling and operation, or operation, of a well [whereby] he may **elect to surrender** his leasehold interest to Joseph G. Bigard on some reasonable basis and for a reasonable consideration which if it cannot be agreed upon shall be determined by the Mining Board.
>
> 3. Provide that Walter Newkirk **may elect to participate** in the drilling and operation, or operation, of the well **on a limited or carried basis** upon such terms and conditions to be just and reasonable."
>
> Petition (empahsis added).

Walter Newkirk received notice in late November of 1980 that a hearing was scheduled in Springfield, Illinois on December 1, 1980. He did not attend that hearing.[2] After that hearing IDMM entered an order purporting to integrate the oil and gas interests of Walter Newkirk and the Lucases at issue pursuant to *Ill. Rev. Stat.*, Ch. 96½, § 5436. That order stated, in part, as follows:

> ". . . that **Walter Newkirk shall participate** in the drilling unit described above to the extent of 37.5% of the 7/8ths **working interest** and 37.5% of the 1/8th royalty interest in the drilling unit. *** The **participation** factor is determined to be:
>
> 1. **37.5%** of the **costs and expenses** of all surface quipment [sic] and 37.5% of the **costs of operating** the well concerning with the production **to be borne by Walter Newkirk** and 62.5% of the costs and expenses of all surface equipment and 62.5% of the costs of operating the well concerned with first production to be borne by Joseph G. Bigard.
>
> 2. **56.25%** of all actual **costs** and expenses of drilling, testing and completing the well **to be borne by Walter Newkirk** and 43.75% of actual costs of drilling, testing and completing said well to be borne by Joseph G. Bigard."
>
> Order (Appendix at 52-53) (emphasis added).

Rather than providing an opportunity for the owners to choose whether to participate or providing reasonable alternatives in the event of non-participation, IDMM was actually **requiring** Walter Newkirk to participate in this unwanted

[2] In an affidavit Walter Newkirk testified that he was an elderly farmer unfamiliar with both legal matters and large cities, that he avoids driving in large cities like Springfield, Illinois because he becomes lost and confused if he does so, and that he telephoned IDMM to let them know he could not attend the hearing.

well. Bigard and the Lucases, apparently treating this order as if it were valid despite the detailed reiteration of the statutory requirements in their Petition, drilled a well in the northeast corner of Walter Newkirk's north 30 acres.

Walter Newkirk testified by affidavit that he was confused when he received a bill, for the first time, from Bigard as to this well in July, 1982 since he did not understand, until December, 1982, that IDMM had sought to force him to participate in this well through this order. In the last bill received from Bigard prior to the filing of the Complaint, Walter Newkirk was being billed for $52,000.00 for net costs allegedly owing to Bigard.

The Newkirks filed a Complaint in January, 1983 seeking, among other things, a declaration that the integration order was void from entry and later amended that Complaint. The trial court, on April 28, 1983, dismissed the counts seeking declaratory relief and the Director of IDMM as a Defandant, by finding that Walter Newkirk had waived his rights by not attending the hearing on the Petition. The appellate court held the integration order could be separated into two parts, one as to integration and one as to participation and that the part relating to integration could be valid and the part relating to participation void from entry. Justice Harrison, in dissent, concluded that the entire order must be held void from entry (Appendix at 46-47).

The supreme court held that IDMM was required by the legislature to include provisions for choice as to participation in each integration order. The supreme court also found, from its own examination of the order, that the legislatively required provisions were not contained in this order. Nonetheless the supreme court held that the order was only voidable not void. The supreme court based this holding on its conclusion that, since IDMM had general subject matter and personal jurisdiction and "inherent authority" to enter integration orders, it did not affect the validity of the order that IDMM had not followed the statutory mandate in entering the order. (Appendix at 31-32).

TIMELY RAISING OF FEDERAL QUESTIONS

Until the judgment of the Illinois Supreme Court was issued on September 20, 1985, that court had consistently held that even if a tribunal possessed both general subject matter and personal jurisdiction it would still enter a void order if it transcended or exceeded its jurisdiction in entering that order (*see e.g., Kenney v. Greer,* 13 Ill. 432, 443 (1851); *Armstrong v. Obucino,* 300 Ill. 140, 142-43, 133 N.E. 58, 59-60 (1921); *Marabia v. Mary Thompson Hospital of Chicago for Women and Children,* 309 Ill. 147, 156, 140 N.E. 836, 839 (1923); *People ex rel. Palmer v. Niehaus,* 356 Ill. 104, 112-13, 190 N.E. 349, 353 (1934); *Mutual Benefit Life Insurance Co. v. Lyons,* 341, 345-46, 20 N.E. 2d 748, 786-87 (1939); *Flake v. Pretzel,* 381 Ill. 498, 505-06, 46 N.E. 2d 375, 379 (1943); *Sweitzer v. Industrial Comm'n,* 394 Ill. 141, 148-49, 68 N.E. 2d 290, 295 (1946); *People ex rel. Wiseman v. Nierstheimer,* 401 Ill. 260, 281-82, 81 N.E. 2d 900, 911 (1948); *People ex rel. Nordlund v. Association of Winnebago Home for the Aged,* 40 Ill. 2d 91, 95-96, 237 N.E. 2d 533, 536 (1968)).

This Court has consistently confirmed that an order which exceeds its jurisdictional bounds is void even though the tribunal entering it has both general subject matter and personal jurisdiction (*see e.g., United States et ux. Wilson v. Walker,* 109 U.S. 258, 265-67, 3 S.Ct. 277, 282-83, 27 L. Ed. 927, 929 (1883); *Windsor v. McVeigh,* 93 U.S. 274, 283, 23 L.Ed. 914, 917 (1876) *Vallely v. Northern Fire & Marine Insurance Co.,* 254 U.S. 348, 353-54, 41 S.Ct. 116, 117, 65 L.Ed. 297 (1920); *Ex Parte Reed,* 100 U.S. 13, 23, 25 L.Ed. 538, 539 (1879); *Reynolds v. Stockton,* 140 U.S. 254, 264-65, 11 S.Ct. 773, 776, 35 L.Ed. 464 (1891)). Prior to September 20, 1985 no written opinion of either the Illinois Supreme Court or this Court, to the best of the knowledge of the Newkirks, signaled the abandonment of these principles.

The Illinois Supreme Court had also, until issuing its judgment in this case, consistently held that the only reason an order entered without jurisdiction might be declared

voidable rather than void was if the jurisdictional defect did not appear on the face of the order or record and instead had to be proved by separate evidence (*see, e.g., Forrest v. Fey,* 218 Ill. 165, 170, 75 N.E. 789, 791 (1905); *People v. Miller,* 339 Ill. 573, 579, 171 N.E. 672, 677 (1930); *Nugent v. Toman,* 372 Ill. 170, 174-75, 23 N.E. 2d 43, 46 (1939); *People ex rel. Baird & Warner, Inc. v. Lindheimer,* 370 Ill. 424, 428, 19 N.E. 2d 336, 339 (1939); *Greenwald v. McCarthy,* 402 Ill. 135, 140-41, 83 N.E. 2d 491, 493-94 (1948); *Janove v. Bacon,* Ill. 2d 245, 249, 128 N.E. 2d 706, 708 (1955); *Fox v. Dep't of Revenue,* 34 Ill. 2d 358, 360, 215 N.E. 2d 271 272 (1966); *People ex rel. Nordlund,* 40 Ill. 2d at 96, 237 N.E. 2d at 536). Contrary to this authority the *Newkirk* court held that a tribunal which exceeds its jurisdiction enters only a voidable order so long as it possesses subject matter and personal jurisdiction and the inherent authority to enter that **kind** of an order.

The *Newkirk* court interpreted the decision in *Illini Coach Co v. Illinois Commerce Comm'n,* 408 Ill. 104, 96 N.E. 2d 518 (1951) to support its conclusion that a tribunal with subject matter and personal jurisdiction which exceeds its jurisdiction enters a voidable rather than a void order. The *Illini Coach* court, however, had held the order at issue in that case to be voidable because the jurisdictional defect complained of had not appeared in the record of the original proceedings (408 Ill. at 106, 109-10, 96 N.E. 2d at 520). The *Illini Coach* decision, in other words, simply applied, without expressly saying so, the same distinction between void and voidable orders that had consistently been applied by the Illinois Supreme Court at all times prior to September 20, 1985.

With these holdings and no prior contrary statements by the Illinois Supreme Court the Newkirks had no reason to conclude that the court would declare the integration order merely "voidable" after finding that the face of the order disclosed a failure by IDMM to follow the statutory mandate (*Nwekirk v. Bigard,* Appendix at 28-29). The federal ques-

tions raised by such an unexpected holding could not have been reasonably anticipated by the Newkirks.

Upon receiving a copy of the court's judgment the Newkirks raised the federal questions created by that judgment by the only means legally available to them, a Petition for Rehearing filed on a timely basis (*see Ill. Rev. Stat.*, Ch. 110A, Rule 367). No answer to this Petition was requested by the court and the Petition was denied without opinion on December 2, 1985. Certain relevant quotations from those parts of the Petition for Rehearing which most directly raised these federal questions are set forth in the Appendix.

Federal questions first presented in a Petition for Rehearing are normally not timely. As Justice Cardozo pointed out, however, federal questions are raised on a timely basis in a Petition for Rehearing as to a court decision:

> "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right (cases omitted)."
>
> *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 367, 53 S.Ct. 145, 149, 77 L.Ed. 360 (1932).

See also Pruneyard Shopping Center v. Robins, 447 U.S. 74, 86, n. 9, 100 S.Ct. 2035, 2043, n. 9, 64 L.Ed. 2d 741 (1980); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78, 50 S.Ct. 451, 453, 74 L.Ed. 1107 (1930); *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313, 320, 50 S.Ct. 326, 327, 74 L.Ed. 870 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320, 37 S.Ct. 638, 640, 61 L.Ed. 1163 (1917). Since the Newkirks could not have anticipated the basis for the federal questions presented by this judgment prior to its issuance and the Newkirks raised those federal questions at the earliest available opportunity, this case is properly before the Court.

ARGUMENT

Without any readily discernable reason, the Illinois Supreme Court effectively overruled numerous vital prior decisions and, at the same time, slashed a wide and deep chasm through the firmament of the legal structure of Illinois. Unless this fissure is closed by this Court the due process rights of persons and entities coming before Illinois courts and agencies can be expected to plummet to destruction within this chasm with regularity.

Under this judgment Illinois courts and agencies who, possessed of general subject matter and personal jurisdiction, enter orders well outside their jurisdictional bounds need not fear that those orders might be void or subject to collateral attack. The well-established bedrock law expressed by the Illinois Supreme Court, this Court, and the courts of the several states notwithstanding, jurisdictional boundaries in Illinois tribunals would be deemed mere fuzzy formalities to be honored at the whim of the tribunal itself.

This ruling is particularly disturbing both because it involves an agency order rather than the order of a court of general jurisdiction and because the ruling attempts, in 1985, to breath life into an order entered five years ago that, under all prior applicable decisions, was a nullity. The seriousness of the broad legal effects emanating from these factors are matched on a more personal level by the immediate impact on the Newkirks. A farmer who had a well forced on his land against his will by an order that was, on its face, null and void is now told that the order is only "voidable" even though it directly defied the legislative mandate and required him to participate or invest in that unwanted well and pay costs out of his own pocket.

The fact that an agency order is involved here leaves no doubt about how broadly this baffling ruling is to be applied. Courts of general jurisdiction and agencies are very different in jurisdictional terms. An agency is "**strictly** a creature of statute" (*see, e.g., City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill. 2d 108, 112-13, 357 N.E. 2d 1154, 1155,

2 Ill. Dec. 711, 712 (1976); *Homefinders, Inc. v. City of Evanston*, 65 Ill. 2d 115, 129, 357 N.E. 2d 785, 792, 2 Ill. Dec. 565. 572 (1976)) and, unlike courts of general jurisdiction, no presumption of jurisdiction attaches to their orders (*see, e.g., People v. Miller*, 339 Ill. at 579, 171 N.E. at 677; *Kenney*, 13 Ill. at 439). Indeed the authority of a tribunal of limited jurisdiction is so carefully questioned in the law that this authority must expressly appear on the face of the order itself for the order to be valid (*see, e.g., Galpin v. Page*, 85 U.S. 350, 356, 18 Wall. 350, 356, 21 L.Ed. 959 (1874); *Givens v. Zarbst*, 255 U.S. 11, 20, 41 S.Ct. 227, 229, 65 L.Ed. 475 (1921); *People v. Miller*, 339 Ill. at 579, 171 N.E. at 677; *Kenney*, 13 Ill. at 439).

It would not be inaccurate to say that an agency acting outside its jurisdictional boundaries does not even **exist** legally. Considering how completely dependant an agency is upon its legislative mandate for its authority to act and indeed for its existence, it is deeply confusing to the Newkirks how the supreme court could fail to declare the integration order void.

IDMM was authorized by the legislature to enter integration orders but was strictly enjoined, as part of that authorization, to include "in each such integration order" provisions establishing opportunities to choose as to participation and, if requested, to make specific provisions for the compensation of interests of non-participating owners without cost to those owners (*Ill. Rev. Stat.*, Ch. 96½, § 5436(d)). The supreme court explicitly construed these statutory requirements to be mandatory (Appendix at 28-29) and also explicitly found:

> "The order at issue in the present case failed to state the time and manner in which Newkirk could elect to participate in the unit and did not provide, as requested by the defendants, one or more equitable alternatives if the Newkirks elected not to participate in the risk and cost of the drilling and operations."
> *Id.* at 28.

Since the statutory requirements are mandatory upon IDMM and the authority to enter integration orders derives solely from the legislature, as it clearly does, then IDMM's failure to comply with this mandate must mean that IDMM entered an order it had no jurisdiction to enter (*see, e.g., Homefinders, Inc.*, 65 Ill. 2d at 129, 357 N.E. 2d at 792, 2 Ill. Dec. at 572).[3]

Until entering its judgment in this case the supreme court had confirmed, each time the occasion arose, that a court or agency, though possessed of general subject matter and personal jurisdiction, enters a void order where it transcends its jurisdictional boundaries in entering that order (*see, e.g., Kenney*, 13 Ill. 2d at 443; *Armstrong*, 300 Ill. at 142-43, 133 N.E. at 59-60; *Marabia*, 309 Ill. at 156, 140 N.E. at 839; *People ex rel. Palmer*, 356 Ill. at 112-13, 190 N.E. at 353; *Mutual Benefit*, 371 Ill. at 345-46, 20 N.E. 2d at 786-87; *Flake*, 381 Ill. at 505-06, 46 N.E. 2d at 379; *Sweitzer*, 394 Ill. at 148-49, 68 N.E. 2d at 295; *People ex rel. Wiseman*, 401 Ill. at 281-82, 81 N.E. 2d at 911; *People ex rel. Nordlund*, 40 Ill. 2d at 95-96, 237 N.E. 2d at 536).

[3] The breakdown in the court's reasoning appears to have occurred in its discussion of "inherent authority". The court correctly noted that its prior decision in *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill. 2d at 112, 357 N.E. 2d at 1155, 2 Ill. Dec. at 712 had "held that an agency order would be declared void if the agency . . . lacked the inherent authority to enter the **particular** order involved." (Appendix at 31) (emphasis added). This is simply another way of saying an agency can be possessed of general subject matter and personal jurisdiction and still enter a void order if it transcends its authority in entering that order.

In the application of the *City of Chicago* holding to the *Newkirk* case, however, the word "particular" is, significantly, omitted as the court states "The mining board also had inherent authority to issue the order." (Appendix at 31) In this context the *Newkirk* court held that, based on its reading of the *City of Chicago* holding, IDMM had jurisdiction to enter the order because it had inherent authority to enter the kind of order entered, namely an integration order. The authority to enter the **kind** of order entered is plainly, part of general subject matter jurisdiction and does not relate to the concern of the *City of Chicago* court, as well as this Court and all the other courts that have decided similarly, that the agency have jurisdiction to enter the **particular** order at issue.

These holdings are equivalent to those of this Court (*see, e.g., Windsor*, 93 U.S. at 283, 23 L.Ed. at 917; *United States et ux. Wilson*, 109 U.S. at 265-67, 3 S.Ct. at 282-83, 27 L.Ed. at 929; *Standard Oil Co. of Indiana v. State of Missouri ex rel. Hadley*, 224 U.S. 270, 281-82, 32 S.Ct. 406, 409, 56 L.Ed. 760 (1912); *Vallely*, 254 U.S. at 353, 41 S.Ct. at 116; *Ex Parte Reed*, 100 U.S. at 23, 25 L.Ed. at 539; *Reynolds*, 140 U.S. at 264-65, 11 S.Ct. at 776) many of which have been decided in the context of due process challenges (*id; see New Orleans Water Works Co.v. City of New Orleans*, 164 U.S. 471, 480, 17 S.Ct. 161, 165, 41 L.Ed. 518 (1896)).

Additionally in all of those jurisdictions which have considered the issue, this principle has been unequivocally held to be the applicable law (*see, e.g., Wanninger v. Lange*, 268 Ala. 402, 406, 108 So. 2d 331, 335 (1959); *Holt v. Powell*, 420 P. 2d 468, 471 (Alaska 1966); *Varnes v. White*, 40 Ariz. 427, 431, 12 P. 2d 870, 871 (1932); *Grayson v. Arrington*, 225 Ark. 922, 926, 286 S.W. 2d 501, 503-04 (1956); *Texas Co. v. Bank of America*, 5 Cal. 2d 35, 39-41, 53 P. 2d 127, 130-31 (1935); *Davidson Chevrolet, Inc. v. City and County of Denver*, 138 Colo. 171, 175, 330 P. 2d 1116, 1118-19 (1958) cert. denied, 359 U.S. 926, 79 S.Ct. 609, 3 L.Ed. 2d 629 (1959); *Campbell v. Campbell*, 58 A. 2d 825, 828 (D.C. Mun. Ct. App. 1948); *Arcadia Citrus Growers Ass'n v. Hollingsworth*, 185 So. 2d 431, 443 (Fla. 1938); *Wright v. Atwood*, 33 Idaho 455, 461, 195 P. 625, 627 (1921); *State ex rel. Public Service Comm'n v. Johnson Circuit Court*, 232 Ind. 501, 509, 112 N.E. 2d 429, 432 (1953); *J.B. Watkins Land-Mortgage Co. v. Mullen*, 54 P. 921, 922-23 (Kan. 1898); *Soper v. Foster*, 244 Ky. 658, 662-63, 51 S.W. 2d 927, 929 (1932); *Taber v. Douglass*, 101 Me. 363, 367, 64 A. 653, 655 (1906); *Maslen v. Andersen*, 163 Mich. 477, 482-83, 128 N.W. 2d 723, 726 (1910); *Sache v. Wallace*, 101 Minn. 169, 172-77, 112 N.W. 386, 387-89 (1907); *Pogue v. Swink*, 365 Me. 503, 511, 284 S.W. 2d 868, 873 (1955); *Pitkin v. Burnham*, 62 Neb. 385, 87 N.W. 2d 160, 162 (1901); *In re Field's Estate*, 40 N.M. 423, 427, 60 P. 2d 945, 947 (1936); *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 296, 169

N.E. 386, 390 (1929); *Shepard v. Leonard*, 223 N.C. 110, 112, 25 S.E. 2d 445, 446-47 (1943); *In re Anderson's Estate*, 76 N.D. 163, 167, 34 N.W. 2d 413, 415-16 (1948); *Russell v. Fourth Nat'l Bank*, 102 Ohio 248, 260-61, 131 N.E. 726, 730 (1921); *Lowry v. Semke*, 571 P. 2d 858, 862 (Okla. 1977); *McKinney v. Nayberger*, 138 Ore. 216, 219, 6 P. 2d 288, 229 (1931); *Reddin v. Frick*, 54 S.D. 277, 282, 223 N.W. 50, 52-53 (1929); *Chickamauga Trust Co. v. Lonas*, 139 Tenn. 228, 234-35, 201 S.W. 777, 778-79 (1918); *Texas Dep't of Public Safety v. Casselman*, 417 S.W. 2d 146, 148 (Texas 1967); *Roddy v. Fitzgerald's Estate*, 113 Vt. 472, 475, 35 A. 2d 668, 670 (1944); *Cauthorn v. Cauthorn*, 196 Va. 614, 623, 85 S.E. 2d 256, 261 (1955); *Little v. Little*, 96 Wash. 2d 183, 197, 634 P. 2d 498, 506 (1981); *Shopper Advertiser, Inc. v. Wisconsin Dep't of Revenue*, 117 Wis. 2d 223, 230, 344 N.W. 2d 115, 119 (1984); *State ex rel. Yohe v. District Court of Eighth Judicial Circuit*, 33 Wyo. 281, 288-89, 238 P. 545, 550 (1925)). Of the thirty-one local jurisdictions other the Illinois, in other words, who have considered the issue each has held the law to be that a tribunal possessed of subject-matter and personal jurisdiction would enter a void order if, on its face, that order exceeds jurisdictional bounds. To the best of the Newkirks' knowledge, none has expressed a conclusion that would agree with or support the Illinois Supreme Court in the present case. As the Minnesota Supreme Court stated:

> "The mere fact that the court has jurisdiction of the subject-matter of an action before it does not justify an excercise of a power not authorized by law, or a grant of relief to one of the parties the law declared shall not be granted. If the court may do so under the guise of 'jurisdiction of the subject matter,' then it may commit **all sorts of depredations upon the rights of parties, particularly in default cases.**"

Sache, 101 Minn. at 172, 112 N.W. at 387 (emphasis added).

Similarly the Virginia Supreme Court noted that it had previously established:

> "that a judgment of a court acting under limited power delegated by statute was void if such judgment was not embraced within the express terms of the statute nor included by necessary inference from the language used."
>
> *Cauthorn*, 196 Va. at 623, 85 S.E. 2d at 261.

See also Watkins v. Watkins, 220 Va. 1051, 265 S.E. 2d 750, 752-53 (1980).

In the *Windsor* case the order had been void due to lack of personal jurisdiction. In later discussing the character of an order void for want of jurisdiction this Court quoted from *Windsor* approvingly:

> " 'It is difficult to speak of a decree thus rendered with moderation. It was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence.'
>
> This language but expresses the most elementary conception of the judicial function."
>
> *Hovey v. Elliot*, 167 U.S. 409, 415, 17 S.Ct. 841, 843, 42 L.Ed. 215 (1897) quoting from *Windsor*, 93 U.S. at 278, 27 L.Ed. at 916.

As indicated previously it has long been established in Illinois that the only distinction between a void and a voidable order is that the jurisdictional defect appears on the face of the record of a void order whereas it must be shown to exist by independent evidence as to a voidable order (*see, e.g., Forrest*, 218 Ill. at 170, 75 N.E. at 791; *People v. Miller*, 399 Ill. at 579, 171 N.E. at 677; *Nugent*, 372 Ill. at 174-75, 23 N.E. 2d at 46; *People ex rel. Baird*, 370 Ill. at 428, 19 N.E. 2d at 339; *Greenwald*, 402 Ill. at 140-41, 83 N.E. 2d at 493-94; *Janove*, 6

Ill. 2d at 249, 128 N.E. 2d at 708; *Fox*, 34 Ill. 2d at 360, 215 N.E. 2d at 272; *People ex rel. Nordlund*, 40 Ill. 2d at 96, 237 N.E. 2d at 536).

For the highest court of a state to declare an order such as the one at issue to be valid or merely voidable strikes at the heart and essence of due process. It would have been a severe blow to due process rights in Illinois for the court to have declared that it would hold the *Newkirk* order void but would henceforth hold orders showing jurisdictional deficiencies on their face only "voidable". The Newkirks contend that the Fourteenth Amendment would not have allowed such a holding but, with that type of result, they might not have been in a position to challenge it. The supreme court has, however, reached back five years and, on its own, arbitrarily given retroactive life to an order that, under all the applicable decisions, was plainly a nullity from entry. In this context the wisdom of Justice Brandeis is appropriate:

> "the violation is none the less clear when that result [a deprivation of property without due process of law] is accomplished by the state judiciary in the course of construing an otherwise valid [citation omitted] state statute. The federal guaranty of due process extends to state action through its judicial as well as its legislative, executive, or administrative branch of government."
>
> *Brinkerhoff-Faris Trust & Savings Co.*, 281 U.S. at 680, 50 S.Ct. at 454.

Justice Brandeis went on to point out:

> "Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

281 U.S. at 682, 50 S.Ct. at 454.

By depriving the Newkirks of their rights to have the integration order declared void, the supreme court violated the due process rights of the Newkirks. The Colorado Supreme Court expressed the standard admirably:

> "A judgment entered where [a jurisdictional] defect exists has neither life nor incipience, and a court is impuissant to invest it with even a fleeting spark of vitality, but can only determine it to be what it is--a nothing, a nullity."

Davidson, 138 Colo. at 175, 330 P. 2d at 1118-19.

Giving life to this nullity is precisely what the *Newkirk* court is attempting to do without any apparent regard for the property interests of the Newkirks. Similarly by depriving the Newkirks of their rights to have had Walter Newkirk provided an opportunity to choose whether he wanted to participate and to have had Walter Newkirk's interests properly provided for as part of that integration order, the supreme court violated the due process rights of the Newkirks. Those rights were, as the *Newkirk* court held, explicitly granted by the statute. This Court has noted:

> "As we explained in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972), property interests 'are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlements to those benefits.' Id. at 577, 92 S.Ct. at 2709."

Parratt v. Taylor, 451 U.S. 527, 529, n. 1, 101 S.Ct. 1908, 1910, n. 1, 68 L.Ed. 2d 420 (1981).

The Illinois Supreme Court also deprived the Newkirks of due process, through its unexpected and retroactive ruling, by arbitrarily sanctioning the taking of property from Walter Newkirk without proper provision, as mandated by the legislature, having been made for his interests in the drilling unit. By declaring the order voidable rather than void that court breathed life into a nullity and its progeny, namely a well illegally drilled on the basis of that nullity. Rather than automatically receiving the reserved mineral interests after May 4, 1981, to which he was entitled under Illinois law, Walter Newkirk is now told by the *Newkirk* court that the well was legally drilled and that these reserved mineral interests will be withheld from him indefinitely. The Illinois Supreme Court has previously determined that it may not even have the authority to alter established precedents where, as here, title to real estate and mineral rights have been created in reliance upon that established law (*see, e.g, Chicago Title & Trust Co. v. Shellaberger*, 399 Ill. 320, 343, 77 N.E. 2d 675, 687 (1948); *see also Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299, 304, 443 N.E. 2d 575, 577, 66 Ill. Dec. 649, 651 (1982)). Certainly this Court cannot allow this startling departure from fundamental principles to stand as the law of the State of Illinois in light of the grave consequences that would be suffered not only by the Newkirks but also by the citizens of Illinois and persons and entities coming in contact with Illinois courts and agencies.

Conclusion

That the constitutional rights of the Newkirks have been unexpectedly violated by the Illinois Supreme Court cannot be doubted. That this decision conflicts with and, indeed, contradicts the prior decisions of this Court and the decisions of all of the states that have previously ruled on the issue, including Illinois, is plain. For this aberrational attack

on the foundations of our legal structures to remain uncorrected by this Court would be interpreted by both those who would usurp powers to themselves and those who fear such unbridled power as an abandonment of any effective leash on unelected government officials. Each would be their own legislature within their general subject matter jurisdiction. The Newkirks pray that this Court grant a writ of certiorari to the Illinois Supreme Court, declare the order void based upon the construction of the statute by the *Newkirk* Court and remand for further proceedings consistent with the rulings of this Court.

Respectfully submitted,
WALTER NEWKIRK and
JUNE FAY NEWKIRK, Petitioners,

By: Richard Briles Moriarty
Attorney for Petitioners

APPENDIX

Judgment of Illinois Supreme Court 26-35
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Docket No. 60754—Agenda 25—May 1985.

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

Filed September 20, 1985

WALTER NEWKIRK, *et al.*, Appellants, v. JOSEPH G. BIGARD *et al.*, Appellees.

JUSTICE RYAN delivered the opinion of the court:

Plaintiffs, Walter and June Fay Newkirk, filed a declaratory judgment action in the circuit court of Jasper County requesting the court to declare an order of the State mining board void *ab initio* in its entirety. Plaintiffs' complaint also requested that title to the mineral estate be quieted in plaintiffs. The circuit court granted the defendants' motion to dismiss the action. The appellate court reversed the circuit court's decision but held the order invalid only in part. (125 Ill. App. 3d 454.) Plaintiffs' petition for leave to appeal to the court was granted pursuant to our Rule 315(a) (94 Ill. 2d R. 315(a)).

The order at issue in this case involves a 40-acre tract of land in Jasper County. The land was originally owned by defendants Paul and Mildred Lucas and Cora Lucas. On May 4, 1961, the Lucasses conveyed the north 30 acres of the tract to the plaintiff Walter Newkirk, reserving one-half of the mineral interests for 20 years and for as long thereafter as oil and gas and other minerals were produced from operations commenced during the 20-year period. Paul and Mildred Lucas later acquired Cora Lucas' interest in the property.

As the end of the 20-year period drew near, Walter Newkirk refused the Lucases requests to enter into an oil and gas lease. On November 13, 1980, the Lucases unilaterally leased their mineral interests to defendant Joseph Bigard. The Lucases and Bigard then petitioned the mining board to integrate all the interest in the tract so that drilling operations could be commenced in accordance with "An Act in relation to oil, gas, coal and other underground resources***." (See Ill. Rev. Stat. 1979, ch. 96½, par. 5436.) The petition contained the information required by statute and requested the board to provide one or more equitable alternatives whereby the plaintiff Walter Newkirk could surrender his interest for reasonable compensation if he elected not to participate in the cost and risk of the drilling and operation of the unit. See Ill. Rev. Stat. 1979, ch. 96½, par. 5436(d).

A hearing on the petition was held on December 1, 1980. Newkirk was given advance notice of the hearing, and his presence was requested. Newkirk did not attend the hearing, nor did he appear through counsel. On December 11, 1980, the mining board issued an order integrating the interests and permitting Bigard to commence drilling operations. The order also stated that Newkirk would participate in the costs and risks of the drilling units and set out the participation factors. Bigard commenced drilling operations on January 11, 1980, and began selling fractional interests. The first oil produced from these operations was sold on April 30, 1981.

Approximately two years after the commencement of the drilling, the plaintiffs, Newkirk and his wife, filed the present declaratory judgment action attacking the mining board's jurisdiction to issue the order. Plaintiffs allege that the mining board was without jurisdiction to issue the order because the order failed to include certain provisions required by statute. The integration statute provides in part:

> "[E]ach such integration order *shall**** prescribe the time and manner in which all the owners in the drilling unit may elect to participate therein; and make provision

for the payment by all those who elect to participate therein of the reasonable actual cost thereof, plus a reasonable charge for supervision and interest. If requested, each such integration order *shall* further provide for one or more just and equitable alternatives whereby an owner who does not elect to participate in the risk and cost of the drilling and operation, or operation, of a well may elect to surrender his leasehold interest to the participating owners on some reasonable basis and for a reasonable consideration***." (Emphasis added.) (Ill. Rev. Stat. 1979, ch. 96½, par. 5436(d).)

The order at issue in the present case failed to state the time and manner in which Newkirk could elect to participate in the unit and did not provide, as requested by the defendants, one or more equitable alternatives if Newk. elected not to participate in the risk and cost of the drilling and operations.

The integration statute unequivocally states that each order "shall" include the election provisions and "shall", if requested, include the equitable alternatives. Generally, the use of the word "shall" in a statute indicates a mandatory obligation, unless the context indicates otherwise. *(People v. Richardson* (1984), 104 Ill. 2d 8, 15; *Andrews v. Foxworthy* (1978), 71 Ill. 2d 13, 21.) Furthermore, the word "shall" will not be given a permissive meaning where it is used with reference to any right or benefit to anyone, and the right and benefit depends upon giving a mandatory meaning to the word. (*Andrews v. Foxworthy* (1978) 71 Ill. 2d 13, 21.) The integration statute gives the mining board the power to require an unwilling interest owner to integrate his interest into a drilling unit. (See Ill. Rev. Stat. 1979, ch. 96½, par. 5436(a).) The word "shall" is used in the integration statute in reference to the right of the unwilling interest owner to choose whether or not he wishes to participate in the costs and risks of the drilling and operation of the unit. The word "shall" is also used in reference to the right of the unwilling owner to choose an equitable alternative whereby he can surrender his interest for just compensation if he does not wish

to participate in the costs and risks of the drilling and operation. The statute does not require that the unwilling interest owner request the equitable alternatives; the equitable alternatives may be requested in the petition for the order, whomever the petitioner may be. (Ill. Rev. Stat. 1979, ch. 96½, par. 5436(d).) The unwilling interest holder's right to choose between the options concerning participation in the costs and risks of the drilling and operation of the unit is dependent upon the term "shall" being given a mandatory meaning. The mining board's order in the present case is defective because it does not give the plaintiff Walter Newkirk the option of not participating in the costs and risks and does not give him an equitable alternative whereby he could surrender his interest for just compensation in lieu of participating in the costs and risks. The fact that the order is defective, however, does not mean that the mining board was without jurisdiction to issue the order.

It should be noted that some confusion has existed over whether this is a declaratory judgment action or an action for judicial review brought pursuant to the provisions of the mining act. (Ill. Rev. Stat. 1979, ch. 96½, par. 5416.) The appellate court treated the action as one brought pursuant to the judicial review section of the statute. (125 Ill. App. 3d 454, 459.) The complaint, however, was filed as a declaratory judgment action. The record show that the plaintiffs have vigorously contended that this is not a judicial review action under the statute but is a declaratory judgment action attacking the entire order of the mining board as being void *ab initio.*

Plaintiffs are seeking to have the entire order declared void *ab initio* through a declaratory judgment action, so as to breath life into their quiet title action. Plaintiffs request the court to declare them sole owners of the mineral estate underlying the north 30 acres of the tract. Plaintiffs contend that if the entire order is void *ab initio* then the drilling permits issued pursuant to the order are also void and thus the operations commenced on the tract were done illegally.

Plaintiffs argue that the provision of the deed extending the Lucases' reservation of one-half of the mineral estate beyond the 20-year primary term for "as long as oil, gas or other minerals are produced from operations commenced within said 20-year period" means operations legally commenced during that period. Thus the basis of plaintiffs' quiet title action is that the extension clause in the deed requires commencement of *de jure* rather than merely *de facto* operations during the primary term. Our purpose in explaining plaintiffs' theory is not to rule on its validity but merely to point out why the plaintiffs have chosen to attack the validity of the entire order by challenging the jurisdiction of the mining board instead of merely bringing an action for judicial review of the order pursuant to the statute. See Ill. Rev. Stat. 1979, ch. 96½, par. 5416.

The general rule is that a party must exhaust its administrative review remedies, including statutory *certiorari,* before seeking equitable relief. *(Graham v. Illinois Racing Board* (1979), 76 Ill. 2d 566, 573; *Illinois Bell Telephone Co. v. Allphin* (1975), 60 Ill. 2d 350, 357-59.) An exception to the general rule exists, however, where the agency rule or order is being challenged on its face as not being authorized by statute. (*Landfill, Inc. v. Pollution Control Board* (1978), 74 Ill. 2d 541, 550-51; *Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill. 2d 540, 548.) The plaintiffs allege that the mining board's order was not authorized by statute. This is a proper issue to be determined by a declaratory judgment action rather than as an action for judicial review.

Plaintiffs allege that the order was not authorized by statute because it did not contain the election provisions and equitable alternatives. While we agree that the failure to include these provisions left the order subject to challenge in some other proceeding, we do not agree that the mining board was without authority to have issued the order.

The term "jurisdiction," while not strictly applicable to an administrative body, may be employed to designate the authority of the administrative body to act, and as such, the

issue is governed by analogy to the rules which are applicable to the courts. (*Pocahontas Mining Co. v. Industrial Com.* (1922), 301 Ill. 462, 474; *People ex rel. Petersen v. Turner Co.* (1976), 37 Ill. App. 3d 450, 461 n.3; *Beam v. Erven* (1971), 133 Ill. App. 2d 193, 196. See *Chicago v. Fair Employment Practices Com.* (1976), 65 Ill. 2d 108, 112.) In *Chicago v. Fair Employment Practices Com.* this court analogized an administrative agency to a court of limited jurisdiction and found that the same rules concerning jurisdiction and validity of orders were applicable. The court held that an agency order would be declared void if the agency lacked jurisdiction of the parties or of the subject matter, or lacked the inherent power to make or enter the particular order involved. *Chicago v. Fair Employment Practices Com.* (1976), 65 Ill. 2d 108, 112.

The mining board had personal jurisdiction over Newkirk. He was served with advance notice of the hearing, and his presence was requested. The mining board also had subject matter jurisdiction. Subject matter jurisdiction is the power to hear and determine causes of the general class of cases to which the particular case belongs. *United Biscuit Co. of America v. Voss Truck Lines, Inc.* (1950), 407 Ill. 488, 499; *Taylor Coal Co. v. Industrial Com.* (1922), 301 Ill. 381, 384.) The "subject matter jurisdiction" granted to the mining board by the integration statute is the power to integrate the interests of unwilling owners into a drilling unit, which constitutes the general class of cases alluded to above. The mining board's order in the present case falls within this general class of cases, as it integrated the plaintiffs' interest into a drilling unit. Thus, the mining board had subject matter jurisdiction.

The mining board also had inherent authority to issue the order. The mining board, being a statutory creation, must find its authority within the statute. *Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill. 2d 540, 551; *City of Chicago v. Fair Employment Practices Com.* (1976), 65 Ill. 2d 108, 112-13.) The integration statute provides that in

cases "[w]here *** owners have not agreed to integrate their interests *** the Mining Board shall, for the prevention of waste or to avoid the drilling of unnecessary wells, require such owners to do so and to develop their lands as a drilling unit, before issuing a permit for the drilling thereon." (Ill. Rev. Stat. 1979, ch. 96½, par. 5436.) The integration statute also gives the mining board the authority to set participation factors and to make provisions for the payment of reasonable actual costs. (See Ill. Rev. Stat. 1979, ch. 96½, par. 5436(d).) Thus the mining board's order, on its face, was authorized by statute and not subject to collateral attack. See *Landfill, Inc. v. Pollution Control Board* (1978), 74 Ill. 2d 541, 550-51; *Bi-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill. 2d 540, 548.

Plaintiffs contend that the mining board was without authority to issue any order which did not contain the election provisions. We disagree. The mining board had personal jurisdiction, subject matter jurisdiction, and the inherent authority to issue the order. An agency's jurisdiction or authority is not lost merely because its order may be erroneous. *Illini Coach Co. v. Illinois Commerce Com.* (1951), 408 Ill. 104, 109.

In *Illini Coach Co. v. Illinois Commerce Com.* the petitioner sought to have certain orders of the Commerce Commission set aside as being void. The petitioner alleged that the Commission, contrary to its statutory limitation, issued the orders without having received or read the transcript of evidence taken by the examiners and without hearing argument or receiving briefs of the parties. The court noted that the Commission had jurisdiction of the parties and the subject matter. The court found that the failure of the Commission to review the transcripts or hear arguments rendered the order voidable, not void, and thus the orders were not subject to collateral attack. *Illini Coach Co. v. Illinois Commerce Com.* (1951), 408 Ill. 104, 110.

In *Beam v. Erven* (1971), 133 Ill. App. 2d 193, the appellate court ruled that an order of a zoning commission was

merely voidable, not void, and thus not subject to collateral attack. The petitioner in *Beam* was attempting to have a zoning board order granting a variation set aside as being void. The zoning ordinance allowed the zoning board to grant variances from the zoning regulations "in the following instances, and in no others:

***

> (2) to permit the use of a lot for a use otherwise prohibited solely because of insufficient area of the lot, but in an event shall the area of the lot be less than 90 percent of the required lot area." *Beam v. Erven* (1971), 133 Ill. App. 2d 193, 197.

The zoning board entered an order granting a variance where the lot was less than 90% of the required area. The appellate court, though using somewhat different reasoning, held that the fact that the zoning board erred in issuing the order did not deprive the zoning board of its authority to issue the variance but rather made the order voidable through a proper review proceeding. The appellate court noted that the zoning board had personal and subject matter jurisdiction and the authority to grant variances. The court held that the granting of a variance of less than 90%, while rendering the order voidable, did not divest the zoning board of its jurisdiction.

Again, the general rule is that a party cannot collaterally attack an agency order in a proceeding such as this unless the order is void on its face as being unauthorized by statute. (*Landfill, Inc. v. Pollution Control Board* (1978), 74 Ill. 2d 541, 550-51; *Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill. 2d 540, 548.) To accept plaintiffs' argument that the failure to include the omitted provisions rendered the order void would allow the exception to swallow up the rule. Plaintiffs' argument would allow a collateral attack on an order whenever the agency has failed to follow the exact letter of a statutory provision. A party could merely point to any provision of a statute which was not complied with and claim that the agency did not have authority to act unless the

provision was complied with. Thus in *Illini Coach Co. v. Illinois Commerce Com.* the plaintiff could have merely claimed that the Commission had no authority to act unless it reviewed the transcript and heard arguments. To accept plaintiffs' argument would be to disregard the distinction between agency orders which are void and subject to collateral attack, and those which are merely voidable and subject to attack only through the applicable administative and judicial review proceedings. We decline to adopt such a rule. It may be that plaintiffs, on judicial review under the statute or in some other proceeding, could challenge certain aspects of the order such as that part of the order which made Newkirk responsible for certain costs because of procedural irregularities. However, that issue was never raised. Plaintiffs' contention has been that the entire order is void.

The mining board's failure to include the omitted provisions did not render the order void; it merely made the order voidable. The order, on its face, was authorized by statute and thus not subject to collateral attack by means of a declaratory judgment action. Thus, the circuit court did not error in dismissing plaintiffs' declaratory judgment action.

Plaintiffs' brief cites numerous decisions concerning Commerce Commission orders wherein the courts have stated that the partial invalidity of an order will render the entire order invalid. (See *Illinois Commerce Com. v. New York Central R.R. Co.* (1947), 398 Ill. 11, 19; *Brotherhood of Railroad Trainmen v. Terminal Railroad Association* (1942), 379 Ill. 403, 407; *Brotherhood of Railroad Trainmen v. Elgin, Joliet & Eastern Ry. Co.* (1940), 374 Ill. 60, 62-65.) The cases cited by plaintiffs are inapplicable because they deal with statutory *certiorari* under the Public Utilities Act, wherein the power of the courts to review the orders is limited by statute and the court had no authority to declare an order only partially invalid. (Ill. Rev. Stat. 1979, ch. 111⅔, par. 72.) The present action was brought as a declaratory judgment action, and as noted above, the issue is not whether the order was correct but whether the agency had the authority to enter the order.

Finally, we wish to note again that our decision in this matter does not involve the application of the judicial review provisions of the mining act (Ill. Rev. Stat. 1979, ch. 96½, par. 5416). The plaintiffs brought this action as a declaratory judgment action attacking the jurisdiction of the mining board to have issued the order, and we have treated it as such. Thus we express no opinion as to whether the failure to include the omitted provisions rendered the entire order or merely a portion of it voidable.

For the reasons stated herein the decision of the appelate court is reversed in part and affirmed in part, and the decision of the circuit court of Jasper County is affirmed.

Appellate court affirmed in part and reversed in part; circuit court affirmed.

IN THE APPELLATE COURT
FOR THE FIFTH APPELLATE DISTRICT OF ILLINOIS
Docket No. 5-83-0415 filed March 6, 1984
WALTER NEWKIRK *et al.*, Appellants - Cross - Appellees
v. JOSEPH G. BIGARD, *et al.*, Appellees - Cross - Appellants

PRESIDING JUSTICE WELCH delivered the opinion of the court:

At issue here is an order of the Illinois Mining Board integrating oil and gas interests in certain Jasper County land and establishing a drilling unit composed of that land. The question presented is whether that order was invalid for failing to prescribe the time and manner in which owners of interests in the proposed unit could elect to participate in it. (Ill. Rev. Stat. 1981, ch. 96½, par. 5436(d).) We hold that it was, but only in part.

The land affected by the order of the Mining Board is a 40 acre tract which was owned prior to 1961 by Paul A. and Mildred A. Lucas (the Lucases) and Cora E. Lucas. On May 4, 1961, these owners conveyed the north 30 acres of this land

to plaintiff Walter Newkirk. The grantors reserved unto themselves a one-half interest in the oil, gas and minerals associated with that property for a period of 20 years from the date of the conveyance "and as long thereafter as oil, gas or other minerals are produced from operations commenced within said 20 year period." On November 13, 1980, the Lucases executed an oil and gas lease to Joseph G. Bigard. This lease, with a primary term extending to February 28, 1981, covered all of the mineral interests of the Lucases in the 40 acre tract.

In late 1980, the Lucases and Bigard filed a petition with the Mining Board. The petitioners sought integration of the mineral interests of the Lucases and Newkirk in the 40 acre tract and the issuance to Bigard of a drilling permit covering that land. They also requested that the Mining Board prescribe the time and manner in which all owners in the proposed drilling unit may elect to participate in it. In the petition it was also suggested, as alternatives, that the board:

> "1. Make provision for the payment by all those who elect to participate therin, of the reasonable actual costs thereof plus a reasonable charge for supervision and interest.
> 2. Provide one or more equitable alternatives if Walter Newkirk does not elect to participate in the risk and cost of the drilling and operation or operations of a well he may elect to surrender his leasehold interest to Joseph G. Bigard on some reasonable basis and for a reasonable consideration which if cannot be agreed upon shall be determined by the Mining Board.
> 3. Provide that Walter Newkirk may elect to paricipate in the drilling and operation or operations of the well on a limited or carried basis upon the terms and conditions to be just and reasonable."

Notices of the hearing on the petition were sent to all interested parties, including Walter Newkirk. A hearing was

held in Springfield on December 1, 1980, at which testimony was heard. Newkirk was not present. On December 11, 1980, the board issued an order integrating the mineral interests of Newkirk and the Lucases in the 40 acre tract and establishing two 20 acre drilling units, one composed of the west half of the tract and the other consisting of its east half. Bigard was authorized to drill wells in both units. The order also stated:

> "that Walter Newkirk shall participate in the drilling unit described above to the extent of 37.5% of the 7/8ths working interest and 37.5% of the 1/8th royalty interest in the drilling unit. The participation factor shall be in accordance with Section 22.2(d) of 'An Act in Relation to Oil, Gas, Coal and Other Surface and Underground Resources and Rules and Regulations,' being a part of Chapter 96½ of the Illinois Revised Statutes. The participation factor is determined to be:
>
> 1. 37.5% of the costs and expenses of all surface equipment and 37.5% of the costs of operating the well concerning with the production to be borne by Walter Newkirk and 62.5% of the costs and expenses of all surface equipment and 62.5% of the costs of operating the well concerned with first production to be borne by Joseph G. Bigard.
> 2. 56.25% of actual costs and expenses of drilling, testing and completing the well to be borne by Walter Newkirk and 43.75% of actual costs of drilling, testing and completing said well to be borne by Joseph Bigard."

On January 19, 1973, Walter Newkirk and his wife June Fay Newkirk commenced this action in the circuit court of Jasper County. Although, as in many actions pertaining to mineral rights, the pleadings were amended to allow the inclusion and deletion of parties, the defendants in these proceedings are those parties who claim interest in the 40 acre

tract by virtue of the Lucases' lease to Bigard, in addition to Brad Evilsizer, the director of the Illinois Department of Mines and Minerals. The Newkirks' complaint was in four counts. Count I averred that the December 11, 1980, order of the Mining Board was invalid, and thus the Newkirks requested the court to declare that order void and declare the rights of the parties accordingly. Count II alleged that there had been no production of oil or gas from the north 30 acres of the tract before May 4, 1981. In this count, the Newkirks sought a declaration that the Lucases' reservation of mineral interests had expired by its own terms. In Count III, the Newkirks demanded damages from Bigard and the Lucases for removing oil and gas from the north 30 acres of the tract even though, as alleged, they were aware that the integration order of the Mining Board was invalid. Based upon the same removal of oil and gas, the Newkirks sought damages in Count IV from the Lucases for breach of warranties in the 1961 deed.

The Lucases, Bigard, and all defendants claiming interests through their lease (the Lucas-Bigard defendants) filed a motion to dismiss the Newkirks' complaint in its entirety. This motion asserted that the complaint constituted an impermissible collateral attack on the order of the Mining Board. Defendant Evilsizer employed similar reasoning in his separate motion to dismiss the complaint, but further contended that the order of the Mining Board was valid.

The Lucas-Bigard defendants also filed a counterclaim against the Newkirks. Count I was for slander of title and in Count II, these defendants sought to quiet title to their mineral interests in the 40 acre tract. The Newkirks moved to dismiss both counts of this counterclaim. Additionally, the Newkirks moved for summary judgment on Counts I and II of their complaint. After several attempts to schedule all of these motions for a single hearing, a nonevidentiary hearing was held on April 28, 1983. The court entered a written order on June 14, 1983.

In that order, the court granted the motion of the Lucas-Bigard defendants (also referred to as counterclaimants) to dismiss Counts I and III of the Newkirks' complaint, but denied that motion as to Counts II and IV. Since defendant Evilsizer was a party only to Count I, his motion to dismiss was also granted. The court granted the Newkirks' motion to dismiss Count I of the counterclaim, but denied that motion as to Count II. It denied the Newkirks' motion for summary judgment on Counts I and II their complaint and ordered all parties to pay their own costs. All dismissals of counts were made without leave to amend, and the court specifically found no just reason for delaying enforcement or appeal of its order. 87 Ill. 2d R. 304(a).

The Newkirks appeal from the dismissal of Counts I and III of their complaint, the dismissal of defendant Evilsizer from the proceedings, the denial of their motion for summary judgment on Counts I and II of their complaint, the denial of their motion to dismiss Count II of the counterclaim, and the court's order pertaining to costs. The counterclaimants have filed a cross-appeal in which they seek reinstatement of Count I of their counterclaim. Defendant Evilsizer and the Newkirk-Bigard defendants have filed separate briefs in this court.

As a preliminary matter, we must address a question of appealability. Defendant Evilsizer argues that we must dismiss that portion of the Newkirks' appeal relating to the court's denial of summary judgment on the first two counts of their complaint. We agree. The denial of a motion for summary judgment is not appealable (*Hildner v. Fox* (1974), 17 Ill. App. 3d 558, 308 N.E. 2d 301; *LaSalle National Bank v. Little Bill "33" Flavors Stores, Inc.* (1967), 80 Ill. App. 2d 298, 225 N.E. 2d 465), and Supreme Court Rule 304(a) findings do not render a non-final order appealable. (*Peterson v. Tazewell County* (1975), 29 Ill. App. 3d 915, 330 N.E. 2d 888.) That part of the Newkirks' appeal taken from the denial of their motion for summary judgment is therefor dismissed.

The counterclaimants oppose the Newkirks' complaint because, as they state, the method provided in section 10 of "An act in relation to oil, gas, coal and other surface and underground resources" (Ill. Rev. Stat. 1981, ch 96½, par. 5416) is the exclusive means to review decisions of the Mining Board. Under that section, "[a]ny interested person affected by this Act or by any rule, regulation or order made or promulgated by the Mining Board hereunder, who may be dissatisfied therewith, shall have the right to file a suit in the Circuit Court of the county wherein is situated any part of the land which is the subject matter of such action, to test the validity of any provision of this Act or any rule, regulation or order made or promulgated hereunder." According to the counterclaimants, this section of the statute justified the circuit court in dismissing Counts I and III of the complaint, which requested the court to evaluate the order of the Mining Board.

The fallacy in this agrument is that the counterclaimants have not demonstrated that the Newkirks' complaint does not comply with section 10. That provision includes no time constraints, and it may not be argued that the complaint was untimely. Section 10 states only that a person affected by an order of the board may sue in a county in which the subject land is located in order to test the validity of that order. The Newkirks' complaint fits that description and, as such, it may be maintained in the circuit court, over the objections advanced by the countreclaimants.

The gist of the Newkirks' argument on appeal is that the trial court erred in not finding the board's integration order to have been void *ab initio.* This erroneous interpretation of the order, contend the Newkirks, underlies the court's dismissal of Counts I and III of the complaint and its failure to dismiss Count II of the counterclaim. The Newkirks urge us to find the integration order invalid and reverse the challenged portions of the trial court's decisions.

To resolve this argument, we must examine section 22.2 of "An Act in relation to oil, gas, coal and other surface and

underground resources" (Ill. Rev. Stat. 1981, ch. 96½, par. 5436) in some detail. This statute provides for the compulsory pooling or integration of mineral interests in separate tracts within or to establish a drilling unit. An integration order:

> "shall authorize the drilling, equipping, and operation, or operation, of a well on the drilling unit; provide who may drill and operate the well; prescribe the time and manner in which all the owners in the drilling unit may elect to participate therein; and make provisions for the payment by all those who elect to participate therein of the reasonable actual cost thereof, plus a reasonable charge for supervision and interest." (Ill. Rev. Stat. 1981, ch. 96½, par. 5436(d).)

If the board is requested, its order

> "shall further provide for one or more just and equitable alternatives whereby an owner who does not elect to participate in the risk and cost of the drilling and operation, or operation, of a well may elect to surrender his leasehold interest to the participating owners on some reasonable basis and for a reasonable consideration which, if not agreed upon, shall be determined by the Mining Board, or may elect to participate in the drilling and operation, or operation, of the well, on a limited or carried basis upon terms and conditions determined by the Mining Board to be just and reasonable." Ill. Rev. Stat. 1981, ch. 96½, par. 5436(d).

The Newkirks maintain that the board's order did not comply with section 22.2. First, they assert that the order was deficient in not prescribing the time and manner in which Walter Newkirk could have elected to participate in the units. Second, they argue that the order improperly failed to offer Newkirk the alternative to surrender his leasehold

interest or participate in the drilling and operation of the well on a limited or carried basis, despite the request of the petitioners that these options be offered to him. These omissions, claim the Newkirks, render the integration order void *ab initio.*

Evilsizer and the counterclaimants reply that inasmuch as the Mining Board has the authority to enter orders pertaining to the integration of mineral interests, and as notice was given to all affected owners, its integration order cannot be attacked collaterally. However, the Mining Board, as an administrative agency, is a creature of statute, having no general or common law powers. It must find within the statute the authority to act, and if it "lacks the inherent power to make or enter the particular order involved," that order may be attacked at any time or in any court, either directly or collaterally. (*City of Chicago v. Fair Employment Practices Commission* (1976), 65 Ill. 2d 108, 112, 357 N.E. 2d 1154, 1155, quoting *Barnard v. Michael* (1945), 392 Ill. 130, 135, 63 N.E. 2d 858, 861.) Since the Newkirks' complaint alleged that the Mining Board exceeded its statutory authority in entering the integration order, that argument is cognizable in the circuit court. Moreover, by pointing to specific deficiencies in the order, the Newkirks are not relying upon conclusory allegations of void agency action, as Evilsizer contends.

Returning to the merits of the Newkirks' complaint, it is apparent that the Mining Board's order did not comply with the statute under which it was entered. First, the order failed to establish a procedure whereby Walter Newkirk could elect to participate or not to participate in the drilling units. Evilsizer maintains that Newkirk had the opportunity to make such an election at the hearing before the Mining Board, and this is all that is necessary under section 22.2. This position, though, ignores the plain language of that provision, which states that the integration order itself shall establish the time and manner in which a party may make such an election. The purpose of this provision is to ensure

that that party knows what he is electing to accept or reject. Requiring an interest owner to object to an integration order at the hearing would not necessarily accomplish that result, in the absence of a statutory requirement that the specifics of the proposed order be announced in final form at that hearing.

The second deficiency of the integration order was in failing to set forth alternatives for Walter Newkirk's participation or non-participation, as requested in the petition for the order. Evilsizer argues that the burden of requesting those alternatives falls upon the individual who desires them, and Newkirk, having failed to do so, cannot now complain of the absence of the alternatives from the integration order. This contention is not supported by the wording of section 22.2. That provision obliges the Mining Board to offer those alternatives "if requested." It does not say that the request must be made by the party to whom the alternatives would be offered. The petition to the board asked that Walter Newkirk be allowed to surrender his leasehold interest or participate in the units on a limited or carried basis. In failing to give Newkirk the opportunity to select from among those alternatives, the integration order exceeded the statutory authority granted to the Mining Board.

The Newkirks insist that as a result of our findings, we can only hold the entire integration order void *ab initio.* We do not agree. A court in its review of an administrative decision has the authority to affirm or reverse the action of the agency in whole or in part. (*Basketfield v. Daniel* (1979), 71 Ill. App. 3d 877, 390 N.E. 2d 492.) We believe that a partial declaration of invalidity is appropriate in our review of the integration order. This is because the provisions governing Walter Newkirk's financial participation in the operation of the units are entirely separable from the provisions of the order establishing the units and allowing the drilling on them. As Evilsizer correctly observes, the very essence of compulsory integration is that an affected owner can do nothing to prevent it, even if he has the right to select the

manner of his participation in drilling operations. In denying Walter Newkirk the ability to determine the nature of his financial stake in the units, the Mining Board took no action which could have led to any other outcome concerning the establishment of the units and the issuance of the drilling permits. Consequently, the order of the board is valid insofar as it integrates the mineral interests of the parties, establishes two drilling units and allows Bigard to drill wells on those units. The remainder of the order is invalid.

Having evaluated the integration order, we must now determine how our conclusions affect the complaint and Count II of the counterclaim. Count I of the complaint sought a declaration that the order was void *ab initio* and a declaration of the rights of the parties given the invalidity of the order. As we have found the integration order not to have been void *ab initio,* we affirm the dismissal of this count. However, since we have found portions of the order invalid, that dismissal should be modified to allow the Newkirks leave to amend this count to conform to our decision.

In Count III, the Newkirks requested damages for wrongful drilling operations performed on their land. They claimed that those operations were unlawful because the integration order was unlawful. But, we have held that the establishment of the units and the issuance of drilling permits were proper. Therefore, the dismissal of this count with prejudice is affirmed. For the same reason, we affirm the trial court's denial of the Newkirks' motion to dismiss Count II of the counterclaim, which is an action to quiet title.

In their cross-appeal, the counterclaimants insist that Count I of the counterclaim states a cause of action for slander of title and therefore should not have been dismissed by the trial court. Slander of title is a false and malicious publication, either oral or written, or words which disparage a person's title to property, resulting in special damages. (*Whildin v. Kovacs* (1980), 82 Ill. App. 3d 1015, 403 N.E. 2d 694; *Home Investments Fund v. Robertson* (1973), 10 Ill.

App. 3d 840, 295 N.E. 2d 85.) The documents which the counterclaimants point to as establishing their claim are the Newkirks' complaint and the accompanying notice by publication, which appeared in the Newton *Press-Mentor.*

The counterclaimants assert that the filing of a complaint in court can be the basis for a slander of title action. The authority cited for this proposition is *Pecora v. Szabo* (1981), 94 Ill. App. 3d 57, 418 N.E. 2d 431, in which a slander of title complaint was premised upon the filing of a *lis pendens* notice. But, a *lis pendens* notice is not a necessary part of the judicial process itself. It is instead a private act, undertaken outside the scope of judicial proceedings, for the purpose of calling to attention of all the world the pendency of litigation affecting the designated real property. (See *West Investment Co. v. Moorhead* (1953), 120 Cal. App. 2d 837, 262 P. 2d 322.) *Pecora* thus does not support the counterclaimants' position that a slander of title action may be based upon the filing of a complaint and further publication necessitated by that filing.

Indeed, in *Nolin v. Nolin* (1966), 68 Ill. App. 2d 54, 215 N.E. 2d 21, the court held that a slander of title action could not be premised upon the presentment of a will for probate. The court reasoned that the absolute privilege normally associated with statements made in connection with legal proceedings (*Libco Corp. v. Adams* (1981), 100 Ill App. 3d 314, 426 N.E. 2d 1130) also attaches to the presentment of a will for probate and bars the slander of title action. This logic applies to Count I of the counterclaim here. To allow a complaint for slander of title to rest upon the institution of judicial proceedings and the publication of notice required by those proceedings would place too great a price on resorting to the courts to settle disputed titles. Accordingly, Count I of the counterclaim was properly dismissed with prejudice.

In conclusion, we take the following action. That portion of the Newkirks' appeal taken from the denial of their motion for summary judgment is dismissed. The dismissal of Count I of the complaint is affirmed, as modified to reflect a

dismissal with leave to amend. That modification requires us to reverse the dismissal of Evilsizer as a defendant. The dismissal with prejudice of Count III of the complaint and Count I of the counterclaim is affirmed, as is the denial of the motion to dismiss Count II of the counterclaim. We need not address the Newkirks' request for costs and fees at this point in the litigation, because we remand this cause to the circuit court of Jasper County for further proceedings consistent with our opinion.

APPEAL DISMISSED IN PART, AFFIRMED IN PART, AFFIRMED AS MODIFIED IN PART, REVERSED IN PART, REMANDED.

JONES J., CONCURRING.

Mr. JUSTICE HARRISON, dissenting in part:

In my view, the December 11, 1980, order of the Mining Board was void *ab initio,* and the circuit court erred in dismissing counts I and III of the Newkirk's complaint. Administrative agencies such as the Mining Board have no general or common law powers; rather, their authority is strictly limited to that conferred by the statutes creating them. (*City of Chicago v. Fair Employment Practices Commission* (1976), 65 Ill. 2d 108, 113, 357 N.E. 2d 1154.) When an order of an agency exeeds this statutory authority, it is void. 65 Ill. 2d 108, 112.

Here the statute governing the Board's actions dictates that integration orders "prescribe the time and manner in which all the owners in the drilling unit may elect to participate therein." (Ill. Rev. Stat. 1981, ch. 96½, par. 5436(d).) Nothing in that statute grants to the Board the authority to simply declare, as it did here, that a given landowner must participate in a drilling unit without having first had the opportunity to decide whether he wishes to do so. Thus, since

the order of December 11, 1980, was one which the Board had no statutory power to make, the dismissal of counts I and III of the Newkirk's complaint was improper.

IN THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
JASPER COUNTY, ILLINOIS
WALTER NEWKIRK, ET AL., Plaintiffs, vs. JOSEPH G. BIGARD, ET AL., Defendants. JOSEPH G. BIGARD, ET AL., Counterplaintiffs, vs. WALTER NEWKIRK, ET AL., Counterdefendants. No. 83-MR-1. filed June 14, 1983.

ORDER
COUNTS I THROUGH IV
FIRST AMENDED COMPLAINT

This cause coming on to be heard this 28th day of April, 1983, and Walter Newkirk and June Fay Newkirk being personally present with their attorney, Richard Briles Moriarty; and Brad Evilsizer, Director of the Department of Mines and Minerals being present by Edward C. McCarthy, Assistant Attorney General; and Defendant, Joseph G. Bigard, being personally present with his attorney Lawrence Eaton, and Defendants, Joseph G. Bigard d/b/a B & B Oil Company, Paul A. Lucas, Mildred A. Lucas, Sam Bigard, Esther Bigard, William E. Borah, Lawrence Eaton, James G. Tomaw, Vernon R. Hildebrand, Martha L. Hildebrand, W. W. Barnhart, Vernal Roan, Laveeda Roan, William E. Roan, Evelyn Roan, Gary K. Tussey, Stanley Schrock and Olney Savings and Loan Association being personally present by Lawrence Eaton, one of their attorneys, and the court having considered the Motion to Strike and Dismiss filed by Brad Evilsizer, the Motion to Dismiss First Amended Complaint filed by Joseph G. Bigard, Joseph G. Bigard d/b/a B & B Oil Company, Paul A. Lucas, Mildred A. Lucas, Sam Bigard, Esther Bigard, William E. Borah, Lawrence Eaton, James G.

Tomaw, Vernon R. Hildebrand, Martha L. Hildebrand, W. W. Barnhart, Vernal Roan, Laveeda Roan, William E. Roan, Evelyn Roan, Gary K. Tussey, Stanley Schrock and Olney Savings and Loan Association and the Motion for Partial Summary Judgment filed by Walter Newkirk and June Fay Newkirk and the counsel and being fully advised in the premises does find that it does have jurisdiction of the parties hereto and the subject matter hereof.

IT IS ORDERED as follows:

1. The motion to strike and dismiss heretofore filed by Brad Evilsizer is granted and Brad Evilsizer, Director of the Department of Mines and Minerals is dismissed as a party in all Counts of the First Amended Complaint with prejudice.

2. The motion of Defendants Joseph G. Bigard, Joseph G. Bigard d/b/a B & B Oil Company, Paul A. Lucas, Mildred A Lucas, Sam Bigard, Esther Bigard, William E. Borah, Lawrence Eaton, James G. Tomaw, Vernon R. Hildebrand, Martha L. Hildebrand, W. W. Barnhart, Vernal Roan, Laveeda Roan, William E. Roan, Evelyn Roan, Gary K. Tussey, Stanley Shcrock and Olney Savings and Loan Association to dismiss Count I of the First Amended Complaint is granted without leave to amend.

3. The motion of Defendants, Joseph G. Bigard, Joseph G. Bigard d/b/a B & B Oil Company, Paul A. Lucas, Mildred A. Lucas, Sam Bigard, Esther Bigard, William E. Borah, Lawrence Eaton, James G. Tomaw, Vernon R. Hildebrand, Martha L. Hildebrand, W. W. Barnhart, Vernal Roan, Laveeda Roan, William E. Roan, Evelyn Roan, Gary K. Tussey, Stanley Schrock and Olney Savings and Loan Association to dismiss Count II of the First Amended Complaint is denied.

4. The motion of Defendants, Joseph G. Bigard, Joseph G. Bigard d/b/a B & B Oil Company, Paul A. Lucas, Mildred A. Lucas, Sam Bigard, Esther Bigard, William E. Borah, Lawrence Eaton, James G. Tomaw, Vernon R. Hildebrand, Martha L. Hildebrand, W. W. Barnhart, Vernal Roan,

Laveeda Roan, William E. Roan, Evelyn Roan, Gary K. Tussey, Stanley Schrock, and Olney Savings and Loan Association to dismiss Count III of the First Amended Complaint is granted without leave to amend.

5. The motion of Defandants, Joseph G. Bigard, Joseph G. Bigard d/b/a B & B Oil Company, Paul A. Lucas, Mildred A. Lucas, Sam Bigard, Esther Bigard, William E. Borah, Lawrence Eaton, James G. Tomaw, Vernon R. Hildebrand, Martha L. Hildebrand, W. W. Barnhart, Vernal Roan, Laveeda Roan, William E. Roan, Evelyn Roan, Gary Tussey, Stanley Schrock and Olney Savings and Loan Association to dismiss Count IV of the First Amended Complaint is denied.

6. The motion of Walter Newkirk and June Faye Newkirk for partial summary judgment on the First Amended Complaint Counts I through II is denied.

The Court at the same time and place also having considered the Motion to Dismiss the Counterclaim of Joseph G. Bigard, Joseph G. Bigard d/b/a B & B Oil Company, Paul A. Lucas, Mildred A. Lucas, Sam Bigard, Esther Bigard, William E. Borah, Lawrence Eaton, James G. Tomaw, Vernon R. Hildebrand, Martha L. Hildebrand, W. W. Barnhart, Vernal Roan, Laveeda Roan, William E. Roan, Evelyn Roan, Gary K. Tussey, Stanley Schrock and Olney Savings and Loan Association and having reviewed the files and hearing the arguments of counsel and being fully advised in the premises does order as follows:

1. The motion of Counterdefendants, Walter Newkirk and June Fay Newkirk to dismiss the Counterclaim Count I of Joseph G. Bigard, Joseph J Bigard d/b/a B & B Oil Company, Paul A. Lucas, Mildred A. Lucas, Sam Bigard, Esther Bigard, William E. Borah, Lawrence Eaton, James G. Tomaw, Vernon R. Hildebrand, Martha L. Hildebrand, W. W. Barnhart, Vernal Roan, Laveeda Roan, William E. Roan, Evelyn Roan, Gary K. Tussey, Stanley Schrock and Olney Savings and Loan Association, Counterplaintiffs, is allowed without leave to amend.

2. The motion of Counterdefendants, Walter Newkirk and June Fay Newkirk to dismiss the Counterclaim Count II of Joseph G. Bigard, Joseph G. Bigard d/b/a B & B Oil Company, Paul A. Lucas, Mildred A. Lucas, Sam Bigard, Esther Bigard, William E. Borah, Lawrence Eaton, James G. Tomaw, Vernon R. Hildebrand, Martha L. Hildebrand, W. W. Barnhart, Vernal Roan, Laveeda Roan, William E. Roan, Evelyn Roan, Gary K. Tussey, Stanley Schrock and Olney Savings and Loan Association, Counterplaintiffs, is denied.

IT IS FURTHER ORDERED that all parties are to pay their own costs to all claims and counterclaims.

The Court further finds there is no just reason to delay enforcement of appeal.

DATED: June 14, 1983.

ENTER: /s/ Michael R. Weber
Judge

APPROVED AS TO FORM:

/s/ Edward C. McCarthy
Edward C. McCarthy

/s/ Lawrence Eaton
Lawrence Eaton

/s/ Richard Briles Moriarty
Richard Briles Moriarty

/s/ James W. Angermeier
James W. Angermeier

STATE OF ILLINOIS
DEPARTMENT OF MINES AND MINERALS
SPRINGFIELD, ILLINOIS

In the matter of the applications filed by Joseph G. Bigard to authorize the drilling of the Lucas Newkirk Consolidated #1 and #2 wells located in Section 31, 8N, 10E, Jasper County, Illinois.	Hearing Order No. 256

This cause came on for hearing before the State Mining Board in the Stratton Office Building, Springfield, Illinois, at 10:00 a.m. on the first day of December, 1980. Present at the hearing for the State Mining Board was Mr. George R. Lane, Hearing Officer. Also present were Joseph G. Bigard, applicant; Lawrence E. Eaton, Attorney at Law on behalf of Joseph Bigard; and Paul B. Lucas. No one appearing on behalf of the objector.

The State Mining Board having considered the oral testimony of witnesses duly sworn and being fully advised in the matter of the applications of Joseph G. Bigard for and integration order to establish drilling units consisting of 20 acres and described as follows:

East half of the Southwest Quarter of the Southeast Quarter to authorize the drilling of a well to be known as the Lucas Newkirk Consolidated #1 located:

330 feet South and 330 feet West of the Northeast corner of the Southwest quarter of the Southeast quarter of Section 31, Township 8 North, Range 10 East, Jasper County, Illinois.

West half of the Southwest Quarter of the Southeast Quarter to authorize the drilling of a well to be known as the Lucas Newkirk Consolidated #2 located:

330 feet South and 330 feet East of the Northwest corner of the Southwest quarter of the Southeast quarter of Section 31, Township 8 North, Range 10 East, Jasper County, Illinois.

finds:

1. That in the interest of conservation and in protection of the correlative rights of those interested in the development of the pool, that the applications of Joseph G. Bigard should be granted.

2. That the parties involved should integrate their interest in the development of their land.

IT IS THEREFORE ORDERED that a drilling unit consisting of 20 acres and described as the East half of the Southwest quarter of the Southeast quarter of Section 31, Township 8 North, Range 10 East, Jasper County is established and Joseph G. Bigard is authorized to drill a well on said drilling unit to be known as the Lucas Newkirk Consolidated #1 and to be located 330 feet South and 330 feet West of the Northeast corner of the Southwest quarter of the Southeast quarter of Section 31, Township 8 North, Range 10 East, Jasper County, Illinois; and that a drilling unit consisting of 20 acres and described as the West half of the Southwest Quarter of the Southeast quarter of Section 31, Township 8 North, Range 10 East, Jasper County, Illinois, is established and Joseph G. Bigard is authorized to drill a well on said drilling unit to be known as the Lucas Newkirk Consolidated #2 and to be located 330 feet South and 330 feet East of the Northwest corner of the Southwest quarter of the Southeast quarter of Section 31, Township 8 North, Range 10 East, Jasper County, Illinois, and that Joseph G. Bigard shall drill said wells and that Walter Newkirk shall participate in the drilling unit described above to the extent of 37.5% of the 7/8ths working interest and 37.5% of the 1/8th

royalty interest in the drilling unit. The participation factor shall be in accordance with Section 22.2 (d) of "An Act in Relation to Oil, Gas, Coal and Other Surface and Underground Resources and Rules and Regulations", being a part of Chapter 96½ of the Illinois Revised Statutes. The participation factor is determined to be:

1. 37.5% of the costs and expenses of all surface quipment [sic] and 37.5% of the costs of operating the well concerning with the production to be borne by Walter Newkirk and 62.5% of the costs and expenses of all surface equipment and 62.5% of the costs of operating the well concerned with first production to be borne by Joseph G. Bigard.
2 56.25% of actual costs and expenses of drilling, testing and completing the well to be borne by Walter Newkirk and 43.75% of actual costs of drilling, testing and completing said well to be borne by Joseph G. Bigard.

If you have any questions pertaining to this matter, please contact Mr. George R. Lane, Petroleum Engineer, whose telpehone [sic] number is 217-782-7756.

DATED at Springfield, Sangamon County, Illinois, this 11th day of December, A.D., 1980.

BY ORDER OF THE MINING BOARD:

/s/ George R. Lane

George R. Lane
Petroleum Engineer

EXCERPTS FROM PETITIONS FOR REHEARING MOST DIRECTLY RELATED TO RAISING OF FEDERAL QUESTIONS

"What the *Illini Coach* Court noted, however, was the general principle that where a court has both subject matter and personal jurisdiction, its order could not be found void based merely on error (408 Ill. at 110, 96 N.E. 2d at 522) which is certainly a correct, if inapplicable, statement of the law. More to the point both before and after *Illini Coach* this Court and the United States Supreme Court had frequently and unequivocally held that a court or agency could possess both subject matter jurisdiction and personal jurisdiction and still enter a void order by 'transcending' its jurisdiction in entering that order (citations of Illinois and United States Supreme Court omitted)." **p. 9**

"If this Court were to hold otherwise by confirming the opinion filed on September 20, 1985, what would be the likely effects? * * * Finally, as will be discussed in the next sections, this entire situation could well result in very serious constitutional implications which would be likely to cloud Illinois law in ways that cannot now even be foreseen."

"This Court has recently reiterated the long-standing principle that '[a]bsent compelling reasons for so doing', earlier decisions of this Court should not be abandoned or modified in civil cases because:

> 'The People and the bar of this state are entitled to rely upon our decisions with assurance that they will not be lightly overruled.'
>
> *Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299, 304, 443 N.E. 2d 575, 577, 66 Ill. Dec. 649, 651 (1982).

Indeed this Court had earlier held it did not even have the authority to make such alterations where, as here, title to real estate and mineral rights have been created in reliance upon the established law in the State remaining established (citations omitted)." **p. 13**

"WHERE THIS COURT, THROUGH ITS OPINION, INJECTS INTO THIS APPEAL FOR THE FIRST TIME A DOCTRINE CONTRARY TO WELL-ESTABLISHED LAW WHICH RESULTS IN DEPRIVATION OF PROPERTY AND IMPAIRMENT OF A VALID CONTRACT, APPELLANTS' DUE PROCESS RIGHTS ARE VIOLATED."

"Through this entire case Appellants have contended that the legislature, through *Ill. Rev. Stat.*, Ch. 96½. § 5436(d), was acting constitutionally. Even though that statute allowed IDMM to force a well to be drilled on Walter Newkirk's land without his consent, this statute was not, Appellants contend, unconstitutional precisely because it required that each interest owner, as part of the integration order, be given an opportunity to decide whether to participate or not and, if no option to participate is exercised, to have their interests properly provided for. IDMM plainly ecxeeded its statutory authority in entering its integration order and the Appellants, based upon this Court's clear and unequivocal rulings in effect since at least 1851, sought a declaration that the IDMM order was void from entry."

"To the surprise of the Appellants this Court has, contrary to its own established principles, determined that the IDMM order is voidable rather than void from entry. As discussed previously since the order on its face discloses how and where IDMM exceeded its statutory authority it appears that the Court is, in effect, holding the IDMM order to be valid rather than either voidable or void for reasons that the Appellants cannot, unfortunately, determine."

"For Walter Newkirk to have had a well forced upon his land through an integration order that did not contain the participation provisions the legislature required IDMM to include in each order and for this Court to unexpectedly sanction this action by IDMM by holding this order merely "voidable" most surely violated the due process rights of the Appellants in several ways. This Court has, in effect, deprived the Appellants of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution (*U.S. Const.*, Amend. XVI). As has been well stated by Justice Brandeis:

> 'The violation is none the less clear when that result [a deprivation of property without due process of law] is accomplished by the state judiciary in the course of construing an otherwise valid [citation omitted] state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.'
>
> *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680, 50 S.Ct. 451, 454, 74 L.Ed. 2d 1107 (1930)

Justice Brandeis went on to point out:

> 'Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.'
>
> 281 U.S. at 682, 50 S.Ct. at 454.

When it is the highest court in the state that is taking the questioned action rather than some lower court the matter becomes more serious and the application of the Fourteenth Amendment more clear since the judgment of the Supreme

Court of a state expresses the power of the state as a whole (*see, e.g., Brown v. Supreme Court of Virginia,* 359 F. Supp. 549, 552, (D.C. Va. 1973), aff'd 414 U.S. 1034, 94 S.Ct. 534, 38 L.Ed. 2d 327."

"Though it is well-settled that no due process violation results from a merely erroneous judicial decision, this Court's opinion in this appeal apparently implicates the Fourteenth Amendment due process provisions in several ways. One manner in which this occurs is through this Court's retroactive interpretation of Section 5436 construing the requirement that the participation provisions be included in each order to be both "mandatory under its prior decisions (Opinion, pp. 2-3) and yet not mandatory for purposes of determining the jurisdictional confines of IDMM in entering such orders (Opinion, p. 7). When a court, through its interpretation of an otherwise constitutional statute, enlarges the terms of that statute retroactively so as to cause a deprivation of property without due process that would not have been allowed or reasonably expected under the original statute, the statute as interpreted is void (*see, e.g., Bouie v. City of Columbia,* 378 U.S. 347, 352, 84 S.Ct. 1697, 1701-02, 12 L.Ed. 2d 894 (1964); *Marks v. United States,* 430 U.S. 188, 192-93, 97 S.Ct. 990, 992-93, 51 L.Ed. 2d 260 (1977). This applies to civil legislation as interpreted by the judiciary when the consequences are 'particularly harsh and oppressive' (*see, e.g., United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 18, n. 13, 97 S.Ct. 1505, 1515, n. 13, 52 L.Ed. 2d 92 (1977); *Welch v. Henry,* 305 U.S. 134, 147, 59 S.Ct. 121, 126, 83 L.E. 87 (1938)) which has been specifically defined to mean the same thing as saying that the legislation, as interpreted, may not be arbitrary or irrational (*see, e.g., Pension Benefit Guaranty Corp. v. R.A. Gray & Co., U.S.* ,104 S.Ct. 2709, 2720, L.Ed. 2d (1984))."

"The statute and all prior applicable decisions by this Court would require declarations that the agency order at

issue is void from entry, the drilling of the well and the removal of oil illegal, and the Newkirks have been the sole owners of all rights to the real estate and mineral rights in question since May 4, 1981 (*see e.g., Armstrong v. Obucino,* 300 Ill. 140, 142-43, 133 N.E. 58, 59-60 (1921)). If, on the other hand, this order is deemed valid or voidable by this Court the well would have to be declared legally drilled, the oil legally removed and the Appellants would be deprived, for so long as production from that well continued, of the one-half (½) interest in the oil, gas and other minerals which should have been owned by them after May 4, 1981. Can there be a rational state purpose to implementing this Court's opinion in light of the very severe deprivation of property the Appellants would therby suffer? Again the Appellants must confess that they can conceive of no rational state purpose whatsoever in the latter course and indeed, in light of the disruption such a course would cause to the Illinois legal structure, contend that the damage done statewide might be far more dramatic than the damage done to the Appellants."

"The due process violations arise, as indicated before, in a number of different ways. The Appellants for example, never had any notice, prior to this Court's opinion, that the long-standing principles of this Court regarding void and voidable judgments would be overruled by this Court and the Appellants might well have taken different actions had they been aware of this potential. Similarly, this Court has, through its opinion, interpreted Section 5436 in a manner which allows that statute, as construed, to retroactively impair the obligations of the contract entered into between Walter Newkirk and the Lucases in 1961. Under that contract, as evidenced by the deed between them, Walter Newkirk was to receive the remaining one-half (½) interest in the oil, gas and other minerals if, after May 4, 1981, no production was then continuing. Under the statute as written the integration order was plainly void and the well illegally

drilled such that this one-half interest was automatically conveyed to Walter Newkirk after May 4, 1981 pursuant to that contract. This Court, through its retroactive construction of Section 5436, would now cause this one-half interest to be withheld from Walter Newkirk for so long as production may continue from this well. Where, as here, the judiciary, through retroactive construction of a statute, causes that statute as construed to impair a contract between private citizens to the extent that their prior reasonable expectations from that contract are infringed, a due process violation occurs (*see, e.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459, U.S. 400, 103 S.Ct. 697, 705, L.Ed. 2d (1983); *United States Trust Co.*, 431 U.S. at 32, 97 S.Ct. at 1522; *Columbia Ry., Gas & Electric Co. v. South Carolina*, 261 U.S. 236, 245, 43 S.Ct. 306, 308, 67 L.Ed. 629 (1923)."

"Yet another due process violation attendant upon this Court's opinion is the deprivation of Walter Newkirk's right, under Section 5436, to be provided with a choice as to participation, in the manner set forth in Section 5436, concurrent with the integration of the oil interests at issue by IDMM. It is settled that:

> '[W]hen a right is given by a state legislature, even though that right is not constitutionally protected, the arbitrary denial of that right is a violation of the Fourteenth Amendment. [Citation omitted.]'
>
> *United States ex rel. Collins v. Jozwiak*, 315 F. Supp. 188, 190 (E.D. Wis. 1970).

The United States Supreme Court has also noted:

> 'As we explained in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972), property interests 'are not created by the Constitution. Rather, they are created and their dimensions are defined by existing

rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' Id at 577, 92 S.Ct. at 2709.'

Parratt v. Taylor, 451 U.S. 527, 529, n. 1, 101 S.Ct. 1908, 1910, n. 1, 68 L.Ed. 420 (1981).

It may well be that the right of Walter Newkirk and other unwilling landowners to be provided the choices mandated by the legislature in "each" integration order is, in fact, constitutionally protected on its own merits since the forced integration of a private landowner's oil rights and the forced drilling of a well on that landowner's real estate would be difficult to justify constitutionally without those provisions as to choice. The United States Supreme Court would be unlikely to hold that a statute which so drastically interferes with a landowner's rights simply to prevent "waste" that did not follow through to actively protect that landowner's financial interests from the disruption caused by the State would pass constitutional muster. Certainly it is unconstitutional to **force** Walter Newkirk to participate, as IDMM did here."

"There can be [no] question that a temporary, non-final deprivation of property is nonetheless a "deprivation" in terms of the Fourteenth Amendment (*see, e.g., Fuentes v. Shevin,* 407 U.S. 67, 84-85, 92 S.Ct. 1983, 1996, 32 L.Ed. 2d 556 (1972)) or that the 'right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal right", whether the "property" in question be a welfare check, a home, or a savings account.' (*see, e.g., Lynch v. Household Finance Corp.,* 405 U.S. 538, 553, 92 S.Ct. 1113, 1122, 31 L.Ed. 2d 424 (1972) or that 'rights in property are basic civil rights' (*id*)."

"It can even be said that, by subjecting Walter Newkirk to a different standard than is applicable to other persons affected by orders plainly void under this Court's other

holdings, this Court may be denying Walter Newkirk his rights to equal protection under the laws as also guaranteed by the Fourteenth Amendment. The Appellants do not wish here, however, to analyze in great detail all of the ways in which this Court's opinion may raise constitutional problems or even do more than provide a broad overview. It is sufficient to note that a multitude of these problems are presented by this opinion as a result of which the Appellants again pray that this Court reexamine its opinion in this appeal and apply its own finely honed precedents to this case." **pp. 14-19.**

NOTIFICATION BY CLERK OF DENIAL OF PETITION

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

December 2, 1985

Mr. Richard B. Moriarty
Attorney at Law
107 S. 5th St.
Effingham, IL 62401

No. 60754 — Walter Newkirk, et al., appellants, v. Joseph G. Biggard, Indv., etc. et al., appellees. Appeal, Appellate Court, Fifth District.

The Supreme Court today *DENIED* the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 12, 1985.